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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re	No.	01-30923 DM
PACIFIC GAS & ELECTRIC COMPANY,	Chapter	11
Debtor.	Date:	July 12, 2001
	Time:	10:00 a.m.
	Ctrm:	Hon. Dennis Montali 235 Pine Street 22nd Floor

UNITED STATES TRUSTEE'S OPPOSITION TO DEBTOR'S MOTION TO SUBMIT HOURLY RATE OF PROPOSED SPECIAL COUNSEL UNDER SEAL

Debtor's motion to seal the record so it need not disclose publicly the hourly rates of pay for its lawyers presents a single question: Does the company's supposed need to keep confidential the hourly rates it pays to its outside lawyers trump the public's longstanding right to unfettered and no-cost access to court records as well as Bankruptcy Rules requiring disclosure of precisely that information? The United States Trustee urges the court deny the motion because the public's right to access should prevail and because debtor has not made a compelling or even interesting argument the information it wants to safeguard is "confidential" within the meaning of the statute upon which it relies.

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I. CONGRESS ADOPTED THE COMMON LAW RIGHT OF UNFETTERED PUBLIC ACCESS TO COURT DOCUMENTS AND THIS RIGHT SHOULD ONLY BE ABRIDGED ON A SHOWING OF "EXTRAORDINARY CIRCUMSTANCE" OR "COMPELLING NEED"

A. The Protections of the First Amendment Are Not Lightly Ignored, Even When a Statute Provides a Limited Safe Harbor

Courts in the United States have uniformly recognized and respected the public's right to unobstructed access to court records. *See Nixon v. Warner Comm. Inc.*, 435 U.S. 589, 597-98, 98 S.Ct. 1306, 1312 (1978). According to the Second Circuit, "This preference for public access is rooted in the public's first amendment right to know about the administration of justice." *Video Software Dealers Assoc. v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24 (2d Cir. 1994). The preference for open court records in bankruptcy proceedings is codified at Bankruptcy Code § 107(a), which provides:

> Except as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times and without charge.

11 U.S.C. § 107(a) (emphasis added).

Our Congress, like our former chief executive, is prudent, recognizing certain exceptions must exist to limit unintended, undesirable consequences of the First Amendment. It enacted Bankruptcy Code § 107(b) to give effect to this prudence. Section 107(b) authorizes a court to "protect an entity with respect to a trade secret or confidential research, development, or commercial information . . ." 11 U.S.C. § 107(b)(1). Debtor seeks a protective order or order to seal under this provision.

But § 107(b) is a statutory *exception* to the rule of unfettered access. "In most cases, a judge must carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need." *In re Orion Pictures Corp.,* 21 F.3d at 24. Before granting any motion, the court must find that the information "fits" into a specified exception. *Id.* Debtor has failed to meet its burden of proving the existence of extraordinary circumstances or a compelling need to seal the hourly rate information, and failed to prove the hourly rates of its lawyers are "confidential" and entitled to protection under § 107(b).

B. Debtor Has Not Shown There is an Extraordinary Circumstance or Compelling Need to Ignore the First Amendment and § 107(a)

Debtor must prove it is entitled to the relief it seeks. In a case arising under Federal Rule of Civil Procedure 26(c)(governing protective orders in civil discovery), Judge Jensen of the District Court held, "The moving party must present a factual showing of a particular and specific need for the protective order. 'A demonstration of good cause embodies a showing (1) that the documents in question truly are confidential and (2) that disclosure of the documents would cause a 'clearly defined and very serious injury.' '" *Welsh v. City and County of San Francisco,* 887 F.Supp. 1293, 1997 (N.D. Cal. 1995) (citations omitted).

Debtor has not sustained its burden. Debtor fails to substantiate its central allegation, disclosure of the hourly rates of its lawyers will cause its lawyers to "extract higher rates for services." (Motion 5:19-23). This allegation and the claim that "inadvertent" disclosures in the past have resulted in "precisely this scenario" cannot be found anywhere in the declaration of Mr. Meiss. In the brief, debtor refers to paragraph 5 of Mr. Meiss's declaration in support of these arguments. Paragraph 5 does not address these matters:

> In order to obtain the most favorable rates possible and keep the costs of legal services as low as possible, PG&E does not divulge to the firms it engages the rates paid to other firms for similar services. Because of concerns regarding the confidentiality of these agreements, PG&E treats the contracts as attorney-client privileged and has a long-standing policy not to provide copies of the actual contracts with outside counsel to anyone other than the pertinent firm.

This seems unexceptional and a normal part of any company's practice. It does not support the dire conclusion urged in the brief, however, that disclosure of hourly rates has lead and will lead to higher rates. The argument of counsel is no substitute for facts. *Ad Hoc Protective Committee for 10 ½ % Debenture Holders v. Itel Corp.(In re Itel Corp.)*, 17 B.R. 942, 945 (Bankr. 9th Cir. 1982).

Debtor's failure to substantiate its central claim of extreme prejudice shows there is no compelling interest at stake to justify abandoning the First Amendment.

C. "Sealing" the Record Imposes an Unjustified Cost on the Public

By sealing the record, the company seeks to place the burden of unsealing the record on the public. If the public seeks the information, it must move the court for an order "unsealing" the record. This mechanism is an additional unwarranted burden on the public.[1/] Unlike an ordinary litigation matter of only limited interest to most non-parties, the bankruptcy of California's important electric utility is a matter of public concern and interest. It is not fair to burden the public with making pro per motions before the court to unseal documents they never knew would be sealed in the first place.

II. "CONFIDENTIAL INFORMATION" IS NOT JUST "INTERESTING INFORMATION" OR "POTENTIALLY USEFUL INFORMATION" – IT IS COMPELLING, CRITICAL INFORMATION AFFECTING DEBTOR'S VIABILITY AND COMPETITIVE ADVANTAGE

A. Courts Strictly Consider the Facts to Determine Whether Information is "Confidential" under § 107(b)

Debtor urges the court accept its conclusion the hourly rate information is "confidential". The court should reject this invitation. The case law in this area is clear: what qualifies as "confidential information" within the meaning of § 107(b) is narrowly limited.

Several examples make this obvious:

In *In re Orion Pictures Corp., supra.*, 21 F.3d at 27-28, the Second Circuit upheld a decision sealing the price at which the debtor sold the rights to re-produce and distribute the rights to the film *Dances with Wolves.* The court found this information was "confidential" because "[d]isclosing the sealed information, including the overall structure, terms and conditions of [the agreement] renders *very likely a direct and adverse impairment to [debtor's] ability to negotiate favorable promotion agreements. . . thereby giving [debtor's] competitors an unfair advantage.*" *Id.* at 28 (citing District Court opinion)(emphasis added).

In *Ad Hoc Protective Committee for 10 ½ % Debenture Holders v. Itel Corp.(In re Itel Corp.)*, 17 B.R. 942 (Bankr. 9th Cir. 1982), the Bankruptcy Appellate Panel overturned an

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1/ The U.S. Trustee acknowledges this mechanism is contemplated by Rule 9018, but submits in the context of this case, it is an unwarranted and unfair burden.

order sealing a list of debtenture holders filed under § 521. The BAP concluded the court received little evidence to support a finding the list would be misused because it had relied largely on "allegation[s] of counsel relative to apprehensions" of what might happen to this information based on counsel's experience and the court found this unconvincing and unsustainable on appeal. The BAP also distinguished the information sealed from truly confidential information: "It is obvious that withholding of commercial information is directed toward not affording an unfair advantage to competitors by providing them information as to the commercial operations of the debtor." *Id.* at 944.

In *Epic Associates V*, 54 B.R. 445 (Bankr. E.D. Va. 1985), the court granted a request to seal the names of banks holding commercial paper issued by the debtor at the request of the banks. Granting the request, the court said, "[T]his is a highly unusual and extraordinary case. More than 100 financial institutiones are involved as creditors of EPIC Associates. *The structure formed by these institutions can be likened to a house of cards . . . If the identities of the institutional lenders and the extent of their investments . . . are disclosed, runs on these institutions . . . could cause the collapse of one or more of them.*" *Id.* at 448 (emphasis added).

In *In re Barney's, Inc.*, 201 B.R. 703 (Bankr. S.D.N.Y. 1996), the debtor asked the bankruptcy court to seal pleadings containing the terms of an anticipated purchase of the company because the disclosure might lead to lower bids in the marketplace. The court evaluated whether this type of information was "confidential information" within the meaning of 11 U.S.C. § 1107(b), concluding it was not. According to the *Barney's* court, confidential information might be information which gives a debtor's competitors an unfair advantage or information related to buying and selling securities in the marketplace. *Barney's*, 201 B.R. at 708. Details of potential bids – arguably the most important event in any bankruptcy case – was not "confidential information" because any adverse affect on debtor's ability to reorganize was only speculative. *Id.*

These cases stand for the principle that "confidential" information is critically important information, central to debtor's business strategy or competitive advantage.

Misuse of truly "confidential information" leads to a "run on the bank", offers a distinct advantage to competitors, or threatens comprehensive settlements. Debtor cannot make that showing here.

B. Hourly Rates are Not "Confidential Information" Entitled to Protection Under § 107(b)

Debtor's request flies in the face of disclosure compelled under the Bankruptcy Code itself. Section 330(a) of the Bankruptcy Code requires each professional seeking compensation from the estate obtain advance court approval for fees by submitting requests setting forth "the time spent on such services . . . [and] the rates charged for such services . . . ." 11 U.S.C. § 330(a)(2)(A)-(B). Bankruptcy Rule 2016(a), implementing § 330, requires "a detailed statement of (1) the services rendered, time expended and expenses incurred; and (2) the amounts requested." Fed. R. Bankr. P. 2016(a). The rules could not be plainer – if one seeks compensation, one must comply with the rules and the rules require disclosure of the means for calculating fees. There is no justification for failing to adhere to this rule.

III. DEBTOR HAS NOT SUPPLIED DECLARATIONS OF PROFESSIONALS TO BE EMPLOYED

The United States Trustee was not served with declarations for the following professionals:

Steven P. Burke, Sedgwick, Detert, Moran & Arnold
David J. Cook, Perkins & Lew
Donald K. Dankner, Winston & Strawn
Michael A. Marks, Finnegan, Marks & Hampton
Katherine M. Quadros, Quadros & Johnson
Michael Scanlan
Paul P. Spalding III
William Douglas White, Lepon, McCarthy et al

No employment order can issue until these firms have complied with Rule 2014(a).

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IV. CONCLUSION

For the foregoing reasons, the United States Trustee urges the motion to seal be denied.

Date: June 29, 2001

Patricia A. Cutler
Assistant United States Trustee

By: _____
Stephen L. Johnson
Attorneys for United States Trustee